2003 BNH 036 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 91-10983-MWV
Chapter 7

R & R Associates of Hampton,
Debtor

Dennis Bezanson, Trustee,
Plaintiff

v. Adv. No. 98-1136-MWV

Thomas J. Thomas, Jr.; Mitchell P. Utell;
Marc Van De Water; Glen C. Raiche;
Thomas & Utell; Thomas, Utell, Van De Water & Raiche;
Thomas, Utell, Van De Water & Raiche, P.A.,
Defendants

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Mitchell P. Utell, Esq.,
Glenn C. Raiche, Esq.,
Thomas & Utell,
Thomas, Utell, Van De Water & Raiche, and
Thomas, Utell Van De Water & Raiche, P.A.

MEMORANDUM OPINION

On January 31, 2003, this Court issued its opinion and order on the instant complaint. The Plaintiff appealed that order, or portions thereof, to the United States District Court for the District of New Hampshire. On June 20, 2003, the United States District Court issued its order affirming the majority of this Court's January 31, 2003, opinion but remanding for further proceedings with respect to Count II of the complaint as follows:

> As Bezanson notes, the bankruptcy court did not expressly consider whether the law firm defendants breached their fiduciary duty to RRA, or were negligent in their representation of RRA, based on other conflict-of-interest issues. The bankruptcy court did note in connection with the conflict-of-interest ruling under 11 U.S.C. § 327 that it was not considering whether the law firm defendants performed adequate legal services, "which would properly be the subject of a subsequent malpractice suit." Mem. Op. At 8. The court also noted that "it is not the Debtor who is complaining in the instant case, but the Trustee, a functionary of the Court in a relevant issue before the Court." Id.
>
> Therefore, the bankruptcy court's decision is not clear with respect to the part of Count II that alleges breach of fiduciary duty and negligence, as in legal malpractice, based on other conflict-of-interest issues. Rather than engage in speculation as to the bankruptcy court's decision on that part of Count II, it is appropriate to remand the case for clarification or further proceedings if necessary, on these issues.

Bezanson v. Thomas, 2003 DNH 106, 11. Initially, this Court finds that there is no necessity for a further hearing. As indicated in the original opinion, the matter was tried over a period of eight days with literally thousands of pages of documents submitted as evidence.

JURISDICTION

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

DISCUSSION

The Court will not reiterate the facts. Suffice it to say that the Court has already found that the Defendants represented both the general partners of the Debtor and the Debtor and that this dual representation constituted a conflict of interest. In accordance with the First Circuit bankruptcy case law, this Court ordered the disgorgement of all fees previously awarded to the Defendants.

As noted in footnote 4 of the district court's opinion,

> The negligence and breach of fiduciary duty claims are pled together in Count II without distinguishing between the claims as separate legal theories. In his reply, Bezanson relies on the clarification of Count II presented to the bankruptcy court in his motion to clarify and supplement Count II. Since that motion was apparently denied, the complaint was not amended or clarified by those supplemental allegations.

Bezanson at 8, n.4.[1] The district court then goes on to say, "[a]lthough Count II may be inartfully pleaded, the record indicates that Bezanson intended to plead breach of fiduciary duty and negligence premised on the law firm defendant's conflict of interest." Bezanson at 10.

This Court, in its original opinion, made findings that the testimony of Thomas was credible in that he believed that the Debtor would be able to confirm a plan of reorganization and that the principals were of substantial financial wealth. The Plaintiff argues, that despite these findings, the Defendants had a fiduciary duty to the Debtor or to creditors, which was breached, and/or that their legal representation of the Debtor was negligent. This Court disagrees. The bankruptcy case originally commenced as a case under Chapter 11 of the Bankruptcy Code. It was subsequently converted to a case under Chapter 7 at which time the Plaintiff was appointed as the Chapter 7 trustee. On conversion, the debtor in possession ceased to exist. This is distinguishable from the continuing "fiduciary duty to the debtor" as there is in a situation where a Chapter 11 trustee is appointed. See Rome v. Braunstein, 19 F.3d 54, 62 (1st Cir. 1994). In the instant case, the Defendants never represented the Chapter 7 trustee or the Chapter 7 estate.

The Plaintiff relied heavily on the fact that the Defendants assisted the principals of the Debtor in the transfer of certain assets to family limited partnerships arguing that the subsequent failure to disclose these transfers and their participation in the transfers was a breach of a fiduciary duty or negligence. Once again, the Court disagrees. First, the transfer of an asset owned individually to an entity such as a partner is not by itself wrong or fraudulent. In the instant case, the Court finds that the transfers were not concealed. To the extent there were transfers of real estate, deeds were prepared and recorded at the

[1]The motion to clarify was denied at a hearing held on October 18, 2001. For some reason, the order was docketed in Adv. 98-1174, but not docketed in Adv. 98-1090 and Adv. 98-1136.

appropriate registries of deeds. The record reflects ample evidence that transfers were made, but there is insufficient evidence that there was intent to conceal the transfers. When asked by the trustee to provide financial statements, they were provided, and they showed the individual partnership interests. The information that these partnerships existed was indeed provided to the trustee. Further, the evidence indicates that the percentage of the partnership attributed to each partner was approximately equal to the value of the assets contributed. Thus, the Court finds there was valid consideration for the transfers from the individuals to the partnership. There is evidence that some of the provisions of the partnership agreement may have been unfriendly to creditors of a partner, but this by itself does not, in this Court's opinion, give rise to a finding that they breached their fiduciary duty or were negligent in their representation of the Debtor.

In an effort to try to make specific determinations when confronted with nonspecific pleadings, the Court has reviewed the Plaintiff's request for findings and rulings of law (Ct. Doc. 90). The bankruptcy cases cited in the request for rulings, nos. 107 and 108, are distinguishable. Fiduciary duties referred to in both In re Bonneville Pacific Corp., 147 B.R. 803, 805 (Bankr. D. Utah 1992) and In re Sky Valley, Inc., 135 B.R. 925, 933 (Bankr. N.D. Ga. 1992) are both in the context of Chapter 11 fee application cases. This Court has already ordered complete disgorgement, a most severe remedy. The fiduciary duties referred to in the case of Mele v. First Colony Life Ins. Co., 127 B.R. 82, 85 (D. D.C. 1991) are those of a Chapter 7 trustee totally distinguishable from the facts of this case. For all of the above reasons, this Court finds that the defendants were not negligent and did not breach their fiduciary duty to the extent they had one. The remaining allegations under Count II are denied.

CONCLUSION

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 21st day of November, 2003, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge